v. 2472

No. 11633

sec'd. 2471

United States

Circuit Court of Appeals

For the Ninth Circuit

BUTTE COPPER AND ZINC COMPANY,
a corporation,

Appellant,

vs.

MRS. NELLIE ALLEN POAGUE,

Appellee.

APPELLANT'S BRIEF

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MONTANA STANDARD, PRINT

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STATEMENT OF JURISDICTION

This is a civil action at law brought by Mrs. Nellie Allen Poague, appellee, who was the plaintiff below, against Butte Copper and Zinc Company, a Maine corporation, appellant, who was the defendant below, for damage to land, including a residence and garage situated thereon, because of alleged breach of duty to furnish subjacent and lateral support in conducting underground mining operations. The complaint alleges diversity of citizenship (R. 2-3). This appeal is from a final money judgment (R. 12-13). Such constitutes a final decision, of which review is allowable under the applicable statute (28 U. S. C., Sec. 225, being Judicial Code Sec. 128, as amended).

STATEMENT OF CASE

Issues and Result

In plaintiff's amended complaint it is alleged that

at all times since December 8th, 1910, she was the owner of Lot 4 and the north 10 feet of Lot 5, Block 67 of the Original Townsite of Butte, Montana, including a 1-story brick veneer dwelling, together with a 2-story brick building thereon, all of the value, but for the acts of defendant, of Seven Thousand Five Hundred Dollars ($7,500.00) (R. 3) and of no greater value because of said acts than Five Hundred Dollars ($500.00) (R. 5).

It is also therein alleged that for a continuous period since July 19th, 1917, defendant, by itself and through its agent, servant or partner, Anaconda Copper Mining Company, by underground mining unlawfully destroyed and impaired the subjacent and lateral support of plaintiff's said property.

It is further therein alleged that at all times since said July 19th, 1917, defendant, by certain partnership agreement, working contract or lease with Anaconda Copper Mining Company, worked and operated certain quartz lode mining claims; and that the contract contained no provision for protection of plaintiff's property by said Anaconda, and that such work of said Anaconda, lessee, and defendant caused the injuries alleged to plaintiff's property (R. 5).

In addition, allegations are made therein that no part of the sum of Seven Thousand Dollars ($7,000.00) has been paid, and that defendant has damaged plaintiff in such sum by reason of some or all of the acts alleged.

It is asked in the amended complaint that said loss and damage having completely occurred, interest be given from the date of filing complaint until paid,

and the prayer is for judgment for Seven Thousand Dollars ($7,000.00) with interest and costs (R. 6).

Defendant's answer, as far as material here, was a denial (R. 7-10).

A jury trial having been demanded (R. 9), the case was tried to a jury (R. 25). After both sides rested (R. 328), defendant moved the court for an order directing a verdict in its favor upon the following grounds:

> "1. That there is no evidence to support a verdict in favor of plaintiff and against the defendant.
>
> "2. That there is no evidence to support a judgment in favor of plaintiff and against defendant.
>
> "3. That there is no evidence that defendant by itself or by or through any agent, servant or partner has done underground mining which caused any damage complained of, and that there is no evidence that defendant as lessor is liable for or did or caused any damage complained of." (R. 329).

This motion the court denied (R. 11, 329). Thereafter, following arguments of counsel and instructions by the court (R. 341-356), the jury retired and subsequently returned its verdict for plaintiff for Five Thousand Five Hundred Dollars ($5,500.00) with interest at Six Percent (6%) per annum from February 2nd, 1946 (R. 11, 370). Following the entry of judgment upon the verdict, defendant appealed (R. 12-14).

Stipulated Facts

Since December 13th, 1910, appellee owned the land and buildings in question "***excepting and reserv-

ing, however, all of the ores and minerals beneath the surface of the above described premises, with the right to mine for, and extract the same***." (R. 27-28).

The appellant, since 1917, has owned the minerals (R. 158).

Undisputed Testimony

That the evidence showed that appellee's property was damaged is conceded by appellant. Likewise, it is true, and appellant therefore concedes, that the evidence shows that damage to such property was caused by underground mining in the Emma.

With reference to the time when the damage complained of first appeared, while most of such damage occurred within two or three years prior to the trial, it was shown that some damage appeared about six years prior to trial (R. 45), or in 1941 in that the trial was had during the months of March and April, 1947 (R. 25).

Undisputed Documentary Evidence

Plaintiff's Exhibit 8-A, received in evidence over appellant's objections (R. 164), is an agreement concerning the mining property herein involved, dated July 6th, 1917, wherein appellant "***leases and demises***" such property unto Anaconda Copper Mining Company, referred to in the agreement as the "Mining Company" (R. 371, 372), for the period from the last mentioned date until and including July 8th, 1931 (R. 373). The consideration therefor inuring to the appellant was, as stated therein, Fifty Per-

cent (50%) of the net returns from all ores and minerals mined thereunder (R. 375).

Among other things and as far as material here, said lease contained the following provisions:

> "* * * It is agreed that the said Mining Company shall have the right, during the said leased term, to work all of the said premises above described and referred to, in mine fashion, and to extract and remove therefrom all ores and minerals which may be encountered, and which, in the Mining Company's opinion, may be desirable or profitable to extract and remove." (R. 373).
>
> "The said Mining Company agrees that it will, during the said leased term, continue in possession of said leased premises and the mine workings therein contained, and that it will install and provide such suitable equipment and machinery as may be necessary in order to operate the same." (R. 373).
>
> "* * * All work done by the Mining Company on said property shall be done in a good, workmanlike, minerlike and substantial manner." (R. 373).
>
> "* * * It is understood and agreed that the management of the property hereby leased, and the conduct of all mining operations thereon, shall be vested exclusively in the Mining Company, or such person or representatives as it may designate; * * *." (R. 376).

Plaintiff's Exhibit 9, received in evidence over appellant's objections (R. 166), dated October 17th, 1927, an agreement between appellant and Anaconda, extends the term of the aforesaid lease until and including July 8th, 1936 (R. 384).

Plaintiff's Exhibit 10, received in evidence over appellant's objections (R. 167), dated June 1st, 1933, an agreement between appellant and Anaconda, extends

the term of the aforesaid lease until and including July 8th, 1941 (R. 390).

Plaintiff's Exhibit 11, received in evidence over appellant's objections (R. 167-168), dated June 24th, 1940, an agreement between appellant and Anaconda, "***leases, lets and demises***" the property leased under the aforesaid lease dated July 6th, 1917, and other property (R. 396-403) for Fifty Percent (50%) of the net returns from all ores and minerals mined thereunder (R. 405-406) from the date of June 24th, 1940, until and including June 24th, 1950, and cancels said lease dated July 6th, 1917 (R. 403). Said agreement of June 24th, 1940, contains provisions substantially identical with the provisions contained in the lease of July 6th, 1917, hereinbefore specifically set forth (R. 404, 406-407).

Evidence as to Who Operated the Emma Mine

Aside from the leasing agreements hereinbefore mentioned, the only evidence tending to connect Butte Copper and Zinc Company in any way with the mining operations in question is the following testimony given by appellee's engineer, Edgar J. Strassberger:

> "Q. Now, were you given permission by the persons operating that shaft to go down and inspect the workings under the Ella Poague property?
>
> "A. I was.
>
> "Q. How often have you had that permission?
>
> "A. Ever since 1944 at times that I desired to go down.

"Q. What Company gave you that permission?

"A. I believe it was the A. C. M. Company.

"Q. Anaconda Copper Mining Company?

"A. That's right.

"Q. And when you wished to go down who would you ask for permission?

"A. I think Mr. Genzberger got me the original arrangements, or you; and I would contact either Mr. O'Kelly's office or Mr. Strandberg.

"Q. Who was Mr. O'Kelly as to the Anaconda Copper Mining Company?

"A. I believe he is the Chief Engineer.

"Q. Does he function as Chief Engineer?

"A. I believe he does; yes, sir.

* * * * * * * * * * * *

"Q. Has somebody been deputed by the Anaconda Copper Mining Company to go with you on your visits underground?

"A. Yes, sir; Fred Strandberg.

* * * * * * * * * * * *

"Q. He is also Assistant to Mr. O'Kelly?

"A. I believe he is an Assistant to Mr. O'Kelly.

"Q. Whose machinery did you go down on?

"A. On the cage operated by the Emma mine.

* * * * * * * * * * * *

"Q. Who operates the cage; I mean the Company?

"A. The Butte Copper and Zinc and Anaconda Copper Mining Company.

"Q. Were you furnished maps by the two Companies here as to the underground workings of the Emma mine with reference to the cross-section going under the Ella Poague property?

"A. No, I was furnished plan maps of the sills

and stopes from which I built up cross-section maps.

* * * * * * * * * * *

"Q. * * * I show you 19. What is 19?

"A. 19 is a plan map built up from the sill maps as furnished me by the Anaconda Copper Mining Company. I built the exhibit.

* * * * * * * * * * *

"Q. And is it built up and composed by you from data, plans and maps furnished you by a Company at the request of the plaintiff's attorneys, Mr. Genzberger and myself?

"A. Yes, sir." (tr. pp. 187-189.)

Any inference from the hereinbefore quoted testimony that appellant had any connection with the maps furnished Strassberger was dispelled by his later explanation upon direct examination by his own counsel:

"Q. You wish to explain something about 'A' and 'B' of 20?

"A. The maps in general. I was asked who furnished the maps and I believe I stated the Butte Copper & Zinc and the A. C. M. Company. Well, I don't know exactly who printed the maps but they were delivered to me either personally by Mr. O'Kelly or Mr. Strandberg, or the attorney for the plaintiff." (tr. pp. 195-196.)

Further, any such inference, as well as any inference that appellant operated the cage at the mine, was dispelled by Strassberger's answers to questions propounded upon cross-examination, as follows:

"Q. I believe you testified this morning, Mr. Strassberger, that you were lowered on a cage at the Emma mine operated by the Anaconda Copper Mining Company and Butte Copper and Zinc Company. Is that true?

"A. I figured that was true when I testified.

"Q. What caused you to figure it?

"A. That it was the Emma property and I understand it's being operated by the Anaconda Copper Mining Company under lease from the Butte Copper and Zinc.

"Q. Under lease from the Butte Copper and Zinc Co.?

"A. That's my understanding.

"Q. Have you any understanding the Butte Copper & Zinc Company has anything to do with the operation of the Emma mine?

"A. No, that's outside of my jurisdiction.

"Q. Why did you say you were lowered on a cage that was operated by the Butte Copper & Zinc?

"A. That's commonly known as the Butte Copper & Zinc property and so I made the statement. I believe it is the Butte Copper and Zinc. As to ownership I can't give you any ownership of the property.

"Q. Then you don't know who operated the cage that lowered you?

"A. No, certainly not; no, I don't.

"Q. Did you testify this morning, Mr. Strassberger, that you were furnished maps, plan maps of sills and stopes by the two companies?

"A. Yes, I did and I tried to correct that. I explained that the maps were made by either one or both companies, I don't know who; but they were furnished me by Mr. O'Kelly, some by Mr. Strandberg, and some of the other maps were delivered to Mr. Genzberger and he delivered them to me and I presume they were made by either or both of those two companies.

"Q. What caused you to presume they may have been made by the Butte Copper & Zinc?

"A. Well, only that it seems to be common

knowledge that's the Butte Copper & Zinc and being operated by the Anaconda Copper Mining Company.

"Q. And from that you concluded the Butte Copper & Zinc prepared the maps?

"A. I concluded that either one did it. I don't know which did it. I wasn't present when the maps were made.

"Q. You know the employer of Mr. William O'Kelly, don't you?

"A. The Anaconda Copper Mining Company.

"Q. You know the capacity he is employed by that Company?

"A. I think Chief Engineer.

"Q. You know the employer of Mr. Strandberg?

"A. The same company.

"Q. In what capacity?

"A. I believe he is principal assistant to Mr. O'Kelly although I don't know; I assume that.

"Q. You certainly don't have any knowledge or information or ground to suspect they are employed by the Butte Copper & Zinc?

"A. I don't know, Mr. Finlen." (tr. pp. 220-222.)

That William A. O'Kelly was the Chief Engineer of Anaconda Copper Mining Company at the time of the trial and had held such position since 1935 appears from the testimony of William A. O'Kelly himself (R. 285, 286). Incidentally, O'Kelly, in answer to the inquiry as to what company had been working the Emma mine since 1917, replied, "The Anaconda Copper Mining Company." (R. 287.)

Aside from the leases hereinbefore mentioned and

from the testimony hereinbefore quoted, the only evidence connecting any person or entity, other than the Anaconda Copper Mining Company and its agents, in any way whatsoever with the mining operations in question, or with knowledge of such operations, was O'Kelly's testimony, as follows:

"Q. Mr. O'Kelly, has the Butte Copper and Zinc Company maintained a resident engineer here during the years the Anaconda Company has been working the mine?

"A. I am not sure of that.

"Q. Do you know Mr. Sam Barker?

"A. Yes, I do.

"Q. Is he in the employ of the Butte Copper and Zinc?

"A. Not to my knowledge.

"Q. What, in the way of progress reports, are opened to the Butte Copper and Zinc Company, and the progress maps of the Emma mine?

"A. While I have not received any instructions except in the case of Mr. Barker, occasionally he has access to the maps.

"Q. And whenever he asks access to the maps it is given?

"A. Yes.

"Q. How long has that course been followed?

"A. Well, so far as I know, since the Anaconda Company started mining the Emma mine.

"Q. And has he access to the mine on request?

"A. I think he has.

"Q. Whenever he requests to go underground, if it was during reasonable hours, it would be permitted?

"A. I think so.

"Q. And to any part of the mine?

"A. I think so.

* * * * * * * * * * *

"Q. Do you know whether or not, as a matter of fact, he has been in the Emma mine?

"A. I have not been with him in the Emma mine but I heard he has gone into the Emma mine.

"Q. Of your own knowledge, you have never been with him and never have seen him down there, is that true?

"A. No, I think I have never seen him in the mine.

"Q. Do you know what periods that he did go into the mine?

"A. No.

"Q. Whether it was a year ago or ten years ago?

"A. No. I know that he has been in the office and has examined the records over a long period and that is all I know personally of his connection with the Butte Copper and Zinc.

"Q. What do you mean by 'records'?

"A. The stope maps, such as we have furnished.

"Q. The same maps we have furnished here?

"A. That is right.

"Q. Has he ever given any orders or direction in the operation of that mine?

"A. Not that I know of.

* * * * * * * * * * *

"Q. How often does he come—you said frequently—how often has he come to see the records?

"A. I would say maybe four or five times a year.

"Q. And for how many years?

"A. Well, since, to my knowledge, since 1931." (tr. pp. 311-312.)

Who Sam Barker was or is does not appear from the record, and the only evidence appearing in the record concerning whether he was a servant or agent of appellant is O'Kelly's negative response to the question, "Is he in the employ of the Butte Copper and Zinc?" O'Kelly replied: "Not to my knowledge." (R. 311.)

SPECIFICATIONS OF ERROR

Appellant hereby specifies error as follows:

I.

The court committed error in refusing to grant defendant-appellant's motion for a directed verdict (tr. p. 329, erroneously referred to in Statement of Points on Appeal as p. 323).

II.

That the court committed error in giving plaintiff-appellee's Instruction numbered 2 (tr. pp. 330, 366, erroneously referred to in Statement of Points on Appeal as pp. 327-328; 355).

That portion of the instruction material here charged the jury that if the mining of the defendant underneath the surface of any of the mining claims involved herein disturbed the surface of plaintiff's land and injured the buildings thereon, then the defendant was liable for all the damage to said property proximately caused thereby (R. 366). The defendant objected to the giving of such instruction for the reason that it made the defendant liable without

any proof that defendant did or supervised any mining act or thing, either by itself or through an agent, which resulted in damage to plaintiff's property (R. 330).

III.

That the court committed error in giving plaintiff-appellee's Instruction numbered 3 (tr. pp. 330-331, 367, erroneously referred to in Statement of Points on Appeal as pp. 327-328; 355-356).

That portion of the instruction material here charged the jury that the plaintiff was entitled under the facts in the case not only to subsurface but to lateral support, and that if the jury found from the evidence that the defendant, by mining down the slope of the vein or veins or by making excavations in the earth in the immediate vicinity of plaintiff's buildings, had disturbed the plaintiff's surface or had, by mining easterly, westerly, northerly or southerly from the side planes underlying plaintiff's property, disturbed either the lateral or the subjacent support of the plaintiff's buildings, then defendant was liable to plaintiff for such disturbance because the law requires defendant to so conduct its mining operations that the surface is at all times sustained (R. 367). The defendant objected to the giving of such instruction for the reason that it permitted the jury to find from the evidence that defendant did actual mining on the premises in question, the evidence being entirely to the effect that defendant did no mining and that all of the mining was done by Anaconda Copper Mining Company (R. 330-331).

IV.

That the court committed error in giving plaintiff-appellee's Instruction numbered 5 (tr. pp. 331, 369, erroneously referred to in Statement of Points on Appeal as pp. 325, 356). The instruction charged the jury that the evidence of damage to other property in the vicinity of plaintiff's, as described in the amended complaint, did not of itself prove damages to plaintiff's property, but if the jury found such damage to have occurred due to mining operations on the part of defendant and that such damages to other property as a direct consequence affected the fair market value of plaintiff's property, then the fact of such damage to adjoining property might be by the jury taken into consideration in fixing the fair market value of plaintiff's property and the amount of damages, if any, to the plaintiff (R. 369). The defendant objected to the giving of such instruction for the reason that it instructed on matters not in issue in the case, there being no evidence of damage to neighboring property which affected the value or interest of plaintiff and the value of plaintiff's property, and for the further reason that the instruction assumed that defendant did actually conduct mining when the evidence was all to the effect that defendant did no mining (R. 331).

V.

That the court committed error in giving plaintiff-appellee's Instruction numbered 9 (tr. pp. 331-332, 368-369, erroneously referred to in Statement of Points on Appeal as pp. 325, 361-363). The instruc-

tion charged the jury with regard to damages if it found for the plaintiff (R. 368, 369). The defendant objected to the giving of such instruction for the reason that the evidence conclusively showed that no act of the defendant caused any damage to the property of plaintiff, that the mining was done under a lease, the rule being that the person operating the lease was liable for surface damage caused by its mining operations, there being no evidence herein to connect defendant in any way with the management or operation of the lease (R. 331, 332).

VI.

That the court committed error in giving plaintiff-appellee's Instruction numbered 11 (tr. pp. 332, 370, erroneously referred to in Statement of Points on Appeal as pp. 326, 364). The instruction charged the jury with reference to interest if it found for plaintiff (R. 370). The defendant objected to the giving of such instruction for the reason, among others, that it assumed that the jury might find against the defendant for acts which were not performed by it (R. 332).

VII.

That the court committed error in refusing to give defendant-appellant's Instruction numbered 1 (tr. pp. 333-334, 362, erroneously referred to in Statement of Points on Appeal as pp. 327-355). The instruction charged the jury that the lessor-defendant was not liable for damages to the plaintiff's property due to the mining operations of the lessee (R. 362). The defendant excepted to the court's refusal to give such

instruction for the reason that the evidence failed to show that the defendant was liable for any damages to plaintiff's property, the evidence being conclusively to the effect that the damages were caused by mining conducted by a lessee and that no direct supervision of the mining was exercised by defendant and no knowledge of the condition existing resulting from the mining was had by the defendant (R. 333, 334).

VIII.

That the court committed error in refusing to give defendant-appellant's Instruction numbered 12 (tr. pp. 335, 364, erroneously referred to in Statement of Points on Appeal as pp. 328-329, 357). The instruction charged the jury to return its verdict in favor of defendant (R. 364). The defendant excepted to the court's refusal to give such instruction for the reason that there was no evidence in the case showing any responsibility of defendant for the damages alleged sustained by plaintiff (R. 335).

IX.

That the court committed error in refusing to give defendant-appellant's Instruction numbered 13 (tr. pp. 335, 364, erroneously referred to in Statement of Points on Appeal as pp. 329, 357). The instruction charged the jury that there was no evidence in the case that the mining operations alleged to have damaged plaintiff's property were carried on by defendant either by itself or through a servant, agent or partner (R. 364). The defendant excepted to the court's refusal to give such instruction for the reason that the evidence conclusively showed defendant did

not conduct any mining operations either by itself or through an agent (R. 335).

X.

That the court committed error in giving that portion of its charge to the jury set forth as follows:

> "If you find from a preponderance of the evidence that continuously since on or about 1917 to April 1, 1946, the time of the filing of the amended complaint herein, the Anaconda Copper Mining Company, a corporation, has been engaged in mining within the Emma, Czarromah and the Nellie quartz lode mining claims, the property of the defendant in this action, with the knowledge and consent of the defendant Butte Copper and Zinc Company, a corporation, as its lessee; and in the course of the mining operations so carried on by the Anaconda Copper Mining Company, a corporation, in the said mining claims, it so disturbed or withdrew from the surface of the property of the plaintiff the subjacent and lateral support of the surface and that as a direct and proximate result thereof, the surface and property of the plaintiff subsided and caused injury and damage to the structures and the property of said plaintiff, then the Butte Copper and Zinc Company, a corporation, is liable for all the damage you find from the evidence the plaintiff sustained by reason of such mining operations." (tr. pp. 338-339, 349, erroneously referred to in Statement of Points on Appeal as pp. 331-333, 342-343).

The defendant objected to the giving of such instruction for the reason that it assumed to make the lessor liable for the actions of the lessee, and for the further reason that there was no evidence of consent on the part of the lessor to the damages, if any, resulting from mining (R. 339).

XI.

That the court committed error in refusing to give defendant-appellant's requested Instruction numbered 16 (tr. pp. 336-337, 365, erroneously referred to in Statement of Points on Appeal as pp. 330-331, 358). The instruction charged the jury that the absence of specific provision in the lease between defendant and Anaconda Copper Mining Company to the effect that the lessee maintained the surface of the demised ground had no bearing on the issues in the case and must, therefore, be disregarded (R. 365). The defendant excepted to the court's refusal to give such instruction for the reason that the law is to the effect that a lessor is not obligated to place restriction in an ordinary lease, and for the further reason that there was no duty upon the lessor, defendant herein, to place any restrictions in its lease to Anaconda Copper Mining Company, it being agreed that the lease shows that Anaconda Copper Mining Company was required to conduct mining operations in a workmanlike manner (R. 336, 337).

ARGUMENT

In appellant's Statement of Points on Appeal, heretofore filed herein (R. 417-425), paragraphs numbered 11, 12, 13, 14 and 15, respectively, concern evidence admitted over defendant's objections, which the trial court subsequently refused to strike upon defendant's motion, relating to leaks, repairs and changes in gas mains and pipes and to gas explosions occurring in numerous places in the City of Butte, Montana; and the trial court's refusal to strike or to instruct

the jury, as requested by appellant, regarding testimony by plaintiff concerning plumbing leaks on and near her property; and concerning the trial court's refusal to instruct the jury, as requested by appellant, regarding evidence of razing the buildings upon plaintiff's property.

While appellant believes that the trial court's action in each of the foregoing particulars was improper in that no cause for which appellant was responsible was shown regarding such evidence, and in that no necessity for the razing of said buildings was shown, no argument will be made herein in support thereof because, as will hereinafter be shown, it is respectfully submitted that for another reason the judgment of the trial court should be reversed and the action dismissed.

Each of appellant's Specifications of Error numbered from and including 1 to and including 10 presents the legal question as to whether or not there is evidence upon which to predicate the conclusion that appellant, a Maine corporation, was liable for the mining of its property in Montana, which was done by another and which caused damage to plaintiff's property. Each and all of the Specifications of Error for the purpose of this argument will be considered together as presenting this one question.

In the amended complaint it is alleged that the mining complained of was done by appellant by itself and through its agent, servant or partner, Anaconda Copper Mining Company (R. 4, 5). No evidence whatever appears which even tends to show that appellant by itself did any mining whatever. The first

impression attempted by the witness Strassberger that both appellant and Anaconda operated the cage at the mine (R. 188) would constitute no evidence that appellant itself did the underground mining which damaged appellee's property. Further, such first impression as to the operation of the cage was corrected by the same witness, Strassberger, when he testified as follows:

> "Q. I believe you testified this morning, Mr. Strassberger, that you were lowered on a cage at the Emma mine operated by the Anaconda Copper Mining Company and Butte Copper and Zinc Company. Is that true?
>
> "A. I figured that was true when I testified.
>
> "Q. What caused you to figure it?
>
> "A. That it was the Emma property and I understand it's being operated by the Anaconda Copper Mining Company under lease from the Butte Copper and Zinc.
>
> "Q. Under lease from the Butte Copper and Zinc Co.?
>
> "A. That's my understanding.
>
> "Q. Have you any understanding the Butte Copper & Zinc Company has anything to do with the operation of the Emma mine?
>
> "A. No, that's outside of my jurisdiction.
>
> "Q. Why did you say you were lowered on a cage that was operated by the Butte Copper & Zinc?
>
> "A. That's commonly known as the Butte Copper & Zinc property and so I made the statement. I believe it is the Butte Copper and Zinc. As to ownership I can't give you any ownership of the property.
>
> "Q. Then you don't know who operated the cage that lowered you?

"A. No, certainly not; no, I don't." (tr. p. 220).

Likewise, the first impression left by the witness, Strassberger, in answer to the leading question of his counsel as to whether or not he had been furnished maps by the two companies with reference to the cross-section going under the Ella Poague property (R. 188) would constitute no evidence that appellant itself engaged in any mining. At the most it would merely constitute evidence that appellant and Anaconda furnished Strassberger with underground mining maps. But that appellant did not furnish any such maps is clear from Strassberger's own testimony with reference to the exhibit prepared by him from the maps furnished by Anaconda:

"19 is a plan map built up from the sill maps as furnished me by the Anaconda Copper Mining Company. I built the exhibit." (tr. p. 189)

as well as from his explanatory testimony as follows:

"Q. You wish to explain something about 'A' and 'B' of 20?

"A. The maps in general. I was asked who furnished the maps and I believe I stated the Butte Copper & Zinc and the A. C. M. Company. Well, I don't know exactly who printed the maps but they were delivered to me either personally by Mr. O'Kelly or Mr. Strandberg, or the attorney for the plaintiff." (tr. pp. 195-196.)

No evidence appears which even tends to show that appellant did the mining complained of through Anaconda Copper Mining Company as its agent, servant or partner. The evidence does show that the mining was done by Anaconda under lease (admitted over appellant's objections. R. 164, 167, 168) from appel-

lant, pursuant to which appellant was to receive Fifty Percent (50%) of the net returns from all ores and minerals mined (R. 375).

Under Montana law a mining partnership exists "***when two or more persons who own or acquire a mining claim for the purpose of working it and extracting mineral therefrom actually engage in working the same." (Revised Codes of Montana of 1935, Sec. 8050). Also, under Montana law "a member of a mining partnership shares in the profits and losses thereof in the proportion which the interest or share he owns in the mine bears to the whole partnership capital or whole number of shares." (Revised Codes of Montana of 1935, Sec. 8052). Appellant did not engage in working the mine, nor did it agree to share any losses from the operation. It merely leased its mining property for a percentage of the net returns. Under the terms of the lease the right to work the property was the right of Anaconda Copper Mining Company (R. 373), the right to possession was the right of Anaconda Copper Mining Company (R. 373), and it was expressly understood and agreed between the two companies that the management of the property and the conduct of all mining operations thereon was "***vested exclusively***" in Anaconda, or such person or representatives as it might designate (R. 376). The lease further provided that all work done by Anaconda be done in a good, workmanlike, miner-like and substantial manner (R. 373).

In view of the facts that appellant did no mining by itself and that appellant did no mining through an agent, servant or partner, and in view of the fact that

the mining was done by Anaconda under a lease from appellant containing the provisions hereinbefore referred to, and in view of the further fact that the record is barren of any evidence indicating any knowledge by appellant of the manner in which the mining under the lease was conducted or of the effects of such mining upon the surface of the earth, the question presented is whether or not under such circumstances the appellant is liable for the damage caused by the mining done by Anaconda. Incidentally, in this connection the Court's attention is directed to the fact that the last leasing agreement was entered into in 1940 (R. 394), which was prior to the earliest sign of damage to appellee's property (R. 45, 25).

There is neither allegation nor proof that the mining was negligently done, but even where mining done by a lessee is done in a negligent manner the general rule is as follows:

> " * * * The lessor of a mine is ordinarily not liable to the owner of the surface for damages caused by the lessee's negligence in mining and taking out coal, unless he has retained or assumed control over the operations, or, with knowledge of the facts, received a benefit therefrom."
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> 40 Corpus Juris, page 1197.

Other texts have the following to say:

> "§ *185. Lease as Affecting.*—A lessee of the mine, and not the lessor, is liable for subsidence of the surface caused by mining operations over which the lessee is in full control. However, a lessor is liable for subsidence caused by operations by his tenant under a mining lease which provides for excavations which will remove the surface support. The lessee of the lower strata of a mine cannot recover from the mineowner for

injuries to his premises caused by the operations of the lessee of the upper strata, unless the owner could have foreseen at the time of making the lease of the upper strata that the operation thereof would necessarily injure the premises of the lower lessee."

36 American Jurisprudence, Sec. 185, page 407.

"A lessee of the minerals, and not the lessor, is liable for a subsidence caused by operations of the former over which he has full control. *Dicta* in Kistler v. Thompson, 158 Pa. 139, 27 Atl. 874, and Little Schuylkill Nav. R. & Coal Co. v. Tamaqua, 1 Walk. (Pa.) 468."

Note to Kansas City Northwestern Railroad Company v. Charles Schwake, Kan., 68 L.R.A. 673, 695.

The specific question as to the liability of the lessor for damage to the surface by the mining operations of the lessee has been dealt with by the courts in a number of cases. In *Republic Iron & Steel Co. v. Barter, 118 So. 749*, the Supreme Court of Alabama states, at page 751:

"It may be conceded, for the purpose in hand, that as a general rule, where the lease contemplates ordinary mining operations, the lessee and not the lessor is liable for damages resulting from subsidence. Such is the effect of a dictum in Alabama Clay Products Co. v. Black, 215 Ala. 170, 110 So. 151, following a like holding, also dictum, in Kistler v. Thompson, 158 Pa. 139, 27 A. 874; 68 L. R. A. note 695; and as was held in Offerman v. Starr, 2 Pa. 394, 44 Am. Dec. 211."

The Alabama court in the case cited above decided both the lessor and the lessee were liable, because the lease expressly authorized the lessee to rob the mine

of pillars and stumps and leave the surface without subjacent support, and it was not decided under the general rule which the court expressly set forth in this case. The facts in the Barter Case are in nowise similar to the facts in the case at bar.

In *Alabama Clay Products Co. v. Black, 110 So. 151,* the court said in part, at page 152:

> "Ordinarily the lessee of the minerals, and not the lessor, is liable for a subsidence of the surface caused by mining operations over which the lessee is in full control. * * *."

The court then continues to set forth some of the exceptions to the general rule, and says, at page 152:

> "* * * On the other hand, if the lessor reserves the right in the lease to direct or control the mining operations of the lessee and gives directions as to taking coal from the pillows or supports of the mine and in consequence of such directions the surface caves in, he is liable to the owner of the surface for the resulting injury. Kistler v. Thompson, 158 Pa. 139, 27 A. 874. Or if he assumes control over the operation, whether the right to do so was reserved in the lease or not, and injury results from his control or direction, he would be liable. In the case of Campbell v. Louisville Coal Co., 39 Colo. 379, 89 P. 767, 10 L. R. A. (N. S.) 822, the Colorado court seems to hold that the lessor would be liable if he received a benefit from the mining operations, with knowledge of the facts, whether he did or did not reserve in the lease a control or direction over the mining operation, or whether or not he was exercising any control whatever over same, proceeding upon the theory that there was an implied duty upon him, which should be read into the lease, of seeing that the lessee so conducted the mining operations as not to injure the surface. As to this, we cannot subscribe, as the mere receipt of a royalty for the mineral even if he

knows of the mining operations would not authorize or require him to interfere and control simply because he may have been the owner of the mineral, in the absence of the reservation of the right to do so under the terms of the lease."

The Supreme Court of Indiana in the case of *Jackson Hill Coal & Coke Co. v. Bales, 108 N. E. 962*, said, *inter alia*, at page 964:

> "Instructions 13 and 14 contain the declaration that it is the owner of the mine and not the lessee who operates it, that is liable for injury to the surface by reason of improper or insufficient support. This was properly refused, as it is the one who takes out the coal without leaving proper support that is liable for damages to the owner of the surface, if the same subside by reason of his failure to properly support it. Schmoe v. Cotton, 167 Ind. 364, 368, 79 N. E. 184; Western Indiana Coal Co. v. Brown, 36 Ind. App. 44, 49, 74 N. E. 1027, 114 Am. St. Rep. 367; Yandes v. Wright, 66 Ind. 319, 325, 32 Am. Rep. 109; 18 Am. and Eng. Ency. Law (2d Ed.) 556, and cases cited; Wilms v. Jess, 94 Ill. 464, 34 Am. Rep. 242, 244; 27 Cyc. 788, note 49; Paull v. Island Coal Co., 44 Ind. App. 218, 222, 88 N. E. 959; Wood on Nuisance (2d Ed.) § 192."

In Hill v. Pardee, 143 Pa. 98, 22 Atl. 815, the court said that it appearing that the removal of coal without leaving sufficient support for the surface *was the act of a lessee of the right to mine the coal, prima facie the lessor of such right was not liable to the owner of the surface for the damages;* and that there could be no recovery against the lessor on his covenant to make good any damage done to the surface by the mining operations conducted underneath it for the reason that the covenant was not declared upon as the basis of the action, and even if it had been, the

lessor and lessee could not have been properly joined since the lessee was not a party to the covenant.

The Supreme Court of Colorado, in the case of *Campbell v. Louisville Coal Co., 89 Pac. 767*, stated, at page 769:

> " * * * The case does not fall within the general rule to the effect that the lessor of premises is not liable for the negligence of his lessee, because, ordinarily, the lessor does not retain, and is under no obligation to retain, control over the demised premises. * * *."

In the Colorado case cited supra the court decided the lessor was liable for injury to the surface owner's property because the lessor had *actual knowledge* that the lessee removed all of the coal, leaving no supports whatsoever, and the lessor consented to and sanctioned these negligent acts of the lessee. See, also, Nisbet v. Lofton, Ky., 277 S. W. 828, in which case the court held the owner liable because he had actual knowledge and consented to the negligence of another in removing coal without leaving supports for the surface. The party doing the actual mining had no lease and the owner could have stopped the mining at any time after the surface owner made complaint.

In the following cases the courts have stated:

> " * * * The principle of law is so well settled that, where one carries on an independent employment in pursuance of a contract, by which he has entire control of the work, and the manner of its performance, his employer is not liable for any negligence of which he may be guilty in the course of his employment, that the citation of authorities is unnecessary labor. * * *."
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> Smith v. Belshaw et al., Cal., 26 Pac. 834.
>
> " 'It is the contention of the defendant that the

law of Noonan v. Pardee controls the instant case. With this contention, the court in banc is in accord, and it is of the opinion that the commonwealth cannot recover damages from an abutting subsequent property owner for the subsidence of a highway caused by a former owner of the mineral estate. Before the commonwealth could recover in a case of this kind, it must aver and prove that the owner whose premises abutted on the highway has actually mined the coal that caused the damage complained of, and that such mining was the proximate cause of the subsidence of the surface. An examination of the cases cited in this opinion, shows that where recovery has been permitted, it is against a defendant who mined the coal.' "

Commonwealth v. Panhandle Min. Co., Pa.,
172 Atl. 106, 107.

"It is well established in this state, as in other jurisdictions, that a landlord is not liable for acts of negligence of tenants. Among the leading cases are Kalis v. Shattuck, 69 Cal. 593, 11 P. 346, 58 Am. Rep. 568, and Higgins v. Los Angeles Gas & Elec. Co., 159 Cal. 651, 115 P. 313, 34 L. R. A. (N. S.) 717. In the first of these cases it was held (69 Cal. 593, at page 597, 11 P. 346, 58 Am. Rep. 568) that a landlord is not liable for the consequences to others of a nuisance in connection with property in the possession and control of a tenant unless the landlord authorized or permitted the act which caused it to become a nuisance occasioning the injury. As stated by the Supreme Court of Massachusetts: 'A landlord is not responsible to other parties for the misconduct or injurious acts of the tenants to whom his estate, when no nuisance or illegal structure existed upon it, has been leased for a lawful and proper purpose.' Saltonstall v. Banker, 8 Gray, 195; Peck v. Peterson, 15 Cal. App. 543, 115 P. 327. The receipt by these defendants of royalty for the minerals, under the circumstances found,

would not authorize or require them to interfere with or control the mining operations carried on by their lessee. Alabama Clay Products Co. v. Black, 215 Ala. 170, 110 So. 151. It is not shown or found that the defendants Hastings or Leet, as administrator, have any interest in the relief sought by the respondents. In the lease of the mining interests these appellants retained the right to enter upon and examine the property at any time and, by its terms, they required the mining company to operate the mine with due regard to the safety, development and preservation of the premises as a working mine. No damages were awarded against the absentee landlords (these appellants), nor were costs assessed against them. We must therefore conclude that the trial court was of the view that they were in no way liable in the premises. No connection has been established between these appellants and the continued flow of water through the tunnel. The restraining order against the maintenance of that condition, so far as these appellants are concerned, seems an idle act. The trial court should have granted their motion to vacate and set it aside. The judgment and order, so far as concerns these appellants, should be reversed and the appellants should have their costs on appeal. It will be so ordered."

O'Leary v. Herbert et al., Cal.,
55 Pac. (2d) 835, 836.

" * * * ' 'Ever since Quarman v. Burnet, 6 Mees. & W. 499, it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching to him, of seeing that duty per-

formed, by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it. Hole v. Sittingbourne & Sheerness Railway, 6 Hurl. & N. 488; Pickard v. Smith, 10 C. B., N. S., 470, 473; Tarry v. Ashton, 1 Q. B. Div. 314.' See Hughes v. Percival, 8 App. Cas. 443; Bower v. Peate, 1 Q. B. D. 321; Woodman v. Metropolitan Railroad, 149 Mass. 335, 21 N. E. 482; 4 L. R. A. 213, 14 Am. St. Rep. 427; Blessington v. Boston, 153 Mass. 409, 26 N. E. 1113; Harding v. Boston, 163 Mass. 14, 39 N. E. 411.' Cabot v. Kingman, 166 Mass. 406, 44 N. E. 345, 33 L. R. A. 45.

"This doctrine was reaffirmed by this court in Republic Iron & Steel Co. v. Barter, 218 Ala. 369, 118 So. 749, and applied to a lessor who authorized the removal by the lessee of the pillars left in the original operation, in consequence of which there was a subsidence, to the damage of the owner. See also Campbell v. Louisville Coal Mining Co., 39 Colo. 379, 89 P. 767, 10 L. R. A., N. S., 822; Alabama Clay Products Co. v. Black, 215 Ala. 170, 110 So. 151."

W. E. Belcher Lumber Co. v. Woodstock Land & Mineral Co., Ala., 15 So. (2d) 625, 628.

"It is settled law in this Commonwealth that the Lessor of a coal mine is not responsible in trespass for the negligent mining by his lessee which results in damage to the surface. In Hill v. Pardee, 143 Pa. 98, 22 A. 815, this court held that in such a case the disturbance of a right of surface support is a tort for which the party which did the mining and not the Lessor was responsible. In Offerman v. Starr, 2 Pa. 394, 44 Am. Dec. 211, this court said in an opinion by Chief Justice Gibson: 'Respondeat superior is inapplicable to an owner of land, for acts of negligence in a business not conducted by him and for

his account. What had these defendants to do with the direction of the business or the coal when it was mined? Lewis covenanted to sink the slope, erect the engine, to take out a certain number of tons each year, according to the most approved method of mining, and carry it to the landing; and to pay a certain sum per ton for it. So far the defendants had nothing to do with the business, but to receive their rent. But they reserved a right to visit and examine the manner in which the business should be carried on in the mine; and to resume the possession should the tenant refuse to furnish statements of the amount taken out, or pay the rent. These clauses do not constitute a reservation of the possession or a right to interfere with the direction of the business. The right of visit was to enable them to see whether the tenant was performing his engagements, in order to found process against him if he were breaking them; and the right to resume the possession was to put an end to the business altogether. The lease was analogous in all respects to the lease of a farm with a clause of re-entry for bad farming, or non-payment of rent. On no principle, then, could the acts of Lewis be imputed to his lessors.'

" * * * Mere collection of 'rents and royalties' as a part of the purchase price does not constitute a participation in the mining.

* * * * * * * * * * *

"Appellant also contends that because the defendants sent a mining engineer into the mine from time to time to inspect and report to the lessor on the mining operations, they 'aided and abetted and participated in the mining and digging out of the said coal as fully and effectually as they individually could have done had they been present in person.' In making this contention the appellant is asking this court to attribute to a well recognized custom in respect to mining 'leased' coal a legal significance the custom does

not have. Lessors of coal, whose remuneration depends on the tonnage mined, are properly vigilant in seeing to it that none of the coal is wasted by reckless, unskilful mining and to this end they customarily reserve the right to inspect the workings either by themselves or by a competent mining engineer. That such a provision does not make the lessor a 'director' of the mining operation was expressly held by this court in Offerman v. Starr, 2 Pa. 394, 44 Am. Dec. 211, supra. In Miles v. Pennsylvania Coal Co., 217 Pa. 449, 66 A. 764, 10 Ann. Cas. 871, this court held that a provision giving the lessor the right to enter the workings for inspection of the mining 'does not change the character of the instrument,' i. e., the coal lease."

Greek Catholic Congregation of Borough
of Olyphant v. Plummer et al.,
Pa., 12 Atl. (2d) 435, 437, 438, 440.

In view of the foregoing authorities, we contend that in that the mining herein involved was done under lease by another with no control exercisable or exercised by the appellant, and with no showing that appellant had knowledge of the actual mining done and consented thereto, the judgment upon the verdict cannot stand and must be reversed. To hold to the contrary would make a mere lessor liable for the acts of others, which acts it did not direct and which acts it had no right to direct or knowledge concerning.

Respectfully submitted,

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Service of the foregoing Brief of Appellant acknowledged and Three copies thereof received this 18th day of August, 1947.

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